

Original Communication

Bovvered? A legal perspective on the ASBO ☆

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Abstract

The Anti-Social Behaviour Order is now a fixture, not just of the legal system in the United Kingdom, but also of the culture and in the public consciousness. The definition of ‘anti-social behaviour’ was left deliberately vague, but this has led to ASBOs being used in a number of situations for which they were not intended. In addition, the zealotry of some local policy-makers has produced huge regional differences in their use. ASBOs are still used against the most vulnerable in society, including children and the mentally ill, and large numbers of people have been imprisoned for breaching them, often for crimes that were not themselves imprisonable or for acts that were not even criminal. There has been widespread criticism of ASBOs from legal and diplomatic quarters, and from officials appointed by the Government itself; and it seems likely that they bring the United Kingdom into breach of many of its most important obligations under international law. The baleful effect of the ASBO is now coming to be seen in other, adjacent areas of social policy, and in some cases, it has actually reversed progressive developments in social policy.

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1. Introduction

In the summer of 2005, a young woman was rescued from a bridge over the River Avon, from which she had been hanging by her fingertips. Whatever help she needed the state to give her, she actually found herself up in court. Having heard that she had attempted suicide four times, the Bath magistrates imposed an order on the woman, banning her from going near railway lines, rivers, bridges or multi-storey car parks.¹

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This case has become somewhat mythical, and it is often given as an example of just why the law is an ass. This paper will consider the legal device that made that possible: the Anti-Social Behaviour Order (‘ASBO’). It will ask what the ASBO does and how, from a legal point of view, it has been received.²

The Labour Party has long been pre-occupied with crime and criminal justice. In 1992, in his first conference speech as Shadow Home Secretary, Tony Blair promised that the party would be “tough on crime, tough on the causes of crime”. And in Government, New Labour has been keen to be seen to deliver on this promise. It has been reported, for example, that between May 1997 and March 2003, 661 new criminal offences were created.³

2. A brief history of the ASBO*2.1. Origins*

The Anti-Social Behaviour Order is a creature of the Crime and Disorder Act 1998, which was New Labour’s first major piece of criminal justice legislation.⁴ However, the origins of the ASBO go back beyond that, to a consultation

paper entitled *A Quiet Life*, which was published in 1995 while Labour was still in opposition.⁵ The paper proposed the creation of what was called a ‘community safety order’, and it was that that became the ASBO.

As the subtitle of the consultation paper – *Tough Action on Criminal Neighbours* – suggests, its emphasis was very much on the control of *offenders*. However, Labour hasn’t always been consistent in this regard.

In the summer of 1995, Mr. Blair’s successor as Shadow Home Secretary, Jack Straw, returned from New York, where he had seen at first hand the effects of the ‘zero tolerance’ policies pursued there. Speaking about his trip, Mr. Straw did not mention hardened criminals. Instead, he said that a Labour Government would “reclaim the streets from the aggressive begging of winos, addicts and squeegee merchants.”⁶

As will be seen, this ambivalence has had profound implications for the form of the ASBO legislation and the way it has been used.

2.2. Use

The ASBO was introduced on 1 April 1999. In the beginning, take-up was modest. In the first 14 months, only 104 ASBOs were made. Between 1 October 2001 and 30 June 2003, this figure had risen to 871 ASBOs; and by 31 December 2004, the total was 3312.⁷ The last date to which figures are currently available is 30 September 2005, and by then, it seems, a total of 7,356 ASBOs had been made.⁸

Among the various regions, Greater Manchester leads the way, with 1,045 ASBOs – more than 14% of the total. The next highest total is in Greater London, where 749 ASBOs have been granted, and then the West Midlands (554 orders) and West Yorkshire (520 orders). Against these figures, Merseyside stands as an oasis of comparative gentility: only 189 ASBOs were made there between April 1999 and September 2005. The lowest total is in Lincolnshire, where only 29 ASBOs have been made.⁹ How is this wide disparity to be explained?

2.3. Disparity in use

There are 11 local government areas in Greater Manchester, and the highest use of the ASBO is in the City of Manchester itself, where 391 orders have been made. Within London, the usual comparator for the City of Manchester is the borough of Camden. In fact, Camden is the borough with the largest number of ASBOs in the whole of Greater London. But its total – 107 ASBOs – represents considerably less than a third of the Manchester total.¹⁰

How might it be explained, this three-fold difference in ASBO rates between broadly comparable areas?

In 2005, the Commissioner for Human Rights in Europe published a very critical report on the use of the ASBO in England and Wales. He said:

“I was surprised by the enthusiasm I encountered amongst the executive and the legislature for this novel extension of civil orders.”¹¹

Could the disparity be attributed to the preoccupations of policy-makers?

In the summer of 2004, the Guardian newspaper published an interview with Basil Curley, who was at the time Manchester City Council’s executive member for housing. Manchester’s was – and remains – a Labour council. Speaking about Manchester’s use of the ASBO, Councillor Curley said:

“We are dealing with Mrs. Thatcher’s grandchildren. We’re dealing with the children of people who grew up under Mrs. Thatcher and were brutalised. We’re recreating society. Putting back some of the social glue. We have nothing – nothing – to be ashamed of as socialists. If you’re rich, you can buy yourself out of it, but these things take place among deprived communities. They want social glue and that’s what we’re trying to give back to them.”¹²

It seems, therefore, that anyone seeking reasons for the huge geographical variation in the take-up of ASBOs should not ignore local municipal zealotry.

3. The legal framework

3.1. Application

An Anti-Social Behaviour Order may be applied for by a local authority or the police,¹³ but not by individuals or community groups. This is seen as an important filter and a necessary safeguard against vigilante-ism.

An application for an ASBO may be made to either a criminal court or a civil court, and even where no such application has been made, the former may impose an ASBO when sentencing a defendant whom it has convicted.

The latest figures suggest that more than 98% of all ASBO applications are successful.¹⁴

3.2. Grounds

An ASBO may be imposed on anyone over the age of 10 years that has acted:

“[...] in an anti-social manner, that is to say, in a manner that causes or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.”¹⁵

There is no need to prove that the defendant *intended* to act in such a manner. (A distinction might be drawn with the Protection from Harassment Act 1997, which, though it too is directed against harassment, alarm or distress, at least requires that a defendant “knows or ought to know” that his/her conduct amounts to such.)¹⁶

If anti-social behaviour can be proved, an ASBO may be granted if it is necessary to protect other people from further anti-social behaviour by the subject;¹⁷ and the court may place conditions on the ASBO.

3.3. Conditions

The first recorded command to mankind was a prohibition. According to the Bible, God told Adam, “Of the tree of the knowledge of good and evil you shall not eat, for in the day that you eat of it you shall surely die.”¹⁸ The prohibitions men have made have proved to be somewhat less clear (although similarly inefficacious).

The purpose of any ASBO conditions should be protective and preventative, not punitive, so they need not be constrained by the behaviour that first brought their subject before the court.¹⁹ Thus, the breadth and ingenuity of any conditions is limited only by the imagination of those that impose them.

The Court of Appeal, however, has ruled that any ASBO conditions must be precise and capable of being understood by their subject,²⁰ and it has recently struck down a number of conditions. For example:

- (a) An order not to do anything that might cause damage was set aside for being too imprecise: did it, for example, prohibit its subject from scuffing his shoes, and could he be sent to prison for so doing?
- (b) An offender was told not to wear anything that could be used to cover his face. He pointed out that virtually any item of clothing would fulfil this purpose, and asked whether it was the intention of the magistrates that he go naked.²¹

3.4. Breach of conditions

Unless there is “reasonable excuse”, breach of the conditions of an ASBO will be a criminal offence, punishable by a fine and/or with imprisonment for up to five years.²² That is so, even if the ASBO was imposed by a civil court.

In fact, and at least until breach, ASBO proceedings are civil in nature. This means, for example, that ‘hearsay’ evidence is regularly used in ASBO cases, often from police officers or housing officers, explaining what an alleged victim has told them.

However, where breach is in question, the criminal standard of proof will apply.²³ This means that before sending a defendant to prison, the court will have to be ‘sure’ s/he breached his/her ASBO.

It seems that at least 40% of ASBOs are breached.²⁴ Figures up to December 2004 were due in March 2006, but they haven’t yet been published.

4. Some legal concerns

The use of the ASBO has attracted a great deal of criticism. In 2005, for example, the Commissioner for Human Rights in Europe suggested that the ASBO system in the UK might breach Article 5 of the European Convention on Human Rights (‘ECHR’) (which, of course, guarantees the right to liberty).²⁵ Among lawyers, there are at least three concerns about ASBOs.

4.1. Hybridity

ASBO proceedings are said to be hybrid because, although they have some civil law features, such as a tolerance of ‘hearsay’ evidence, they can and often *do* end with a criminal penalty.

This *hybridity* is controversial: first, because it is seen as blurring a distinction that should remain clear and hard; and second, because it can make for confusion, at least from an evidential point of view.

There are those that say we should not confuse criminal law with civil law, and that ASBOs are unacceptable because they do just that. This argument is not, however, persuasive, for the civil/criminal distinction has been blurred pretty thoroughly already. This is perhaps most obvious in the various forms of regulatory proceedings that have proliferated over the last few years, involving *quasi-judicial* bodies such as the GMC and the NMC. Furthermore, it has long been the case that some criminal offenders – beggars, for example, or people that park on double-yellow lines – aren’t imprisoned, while those that breach civil orders – for example in matrimonial or child care cases – *are*.

But the evidential confusion inherent in ASBO proceedings is harder to dismiss. That confusion was pin-pointed by the European Human Rights Commissioner, who said:

“[...] I find the combination of a criminal burden of proof with civil rules of evidence rather hard to square; hearsay evidence and the testimony of police officers or ‘professional witnesses’ do not seem to me to be capable of proving alleged behaviour beyond reasonable doubt.”²⁶

4.2. Double jeopardy

Where the act that breaches an ASBO is itself a criminal one, it is possible that the penalty for breach – which might be up to five years’ imprisonment – will be greater than the one the act would have received in its own right. The justification for this was set out by the Labour Party in 1995:

“The criminal justice system tends to treat the commission of a crime as an acute rather than a chronic condition. The system is therefore at its least effective where the offending behaviour is chronic and persistent, where the separation of incidents may lack forensic worth, where it is the *aggregate impact* of criminal behaviour which makes it intolerable and where the whole is much more than the sum of its parts.”²⁷

The counter-argument is obvious. If, when sentencing someone for breaching an ASBO, a court takes into account the conduct that led to the ASBO being imposed in the first place, it will in effect punish him/her twice for the same offence. Critics say this infringes the rule against ‘double jeopardy’, one variant of which says, quite simply, that someone can’t be punished twice for the same offence.

The double jeopardy rule appears in a number of international legal texts, including Article 4 of Protocol 7 to the ECHR.²⁸ Although the United Kingdom is signed up to the ECHR, and enacted the Human Rights Act 1998 to give it effect in England and Wales, it has never ratified and does not accept Protocol 7.

However, the double jeopardy rule also appears in Article 14(7) of the International Covenant on Civil and Political Rights ('ICCPR').²⁹ The UK *has* ratified the ICCPR – including Article 14.

Therefore, to the extent that its use might come to infringe the double jeopardy rule, the ASBO would appear to breach the UK's obligations under international law.

4.3. Sentencing

Around 55% of breaches are punished by immediate imprisonment.³⁰

One of the most controversial features of the ASBO system is that it can result in someone being sent to prison for a non-criminal act that breaches an ASBO imposed for another non-criminal act. A person may be sent down, in other words, not because what s/he did was a criminal offence, but because s/he did it twice.

These concerns were realised in the case of the Birmingham beggar, who breached an ASBO imposed because he was found begging. He was sent to prison, first for 2 years, and then, when he begged again, for three years. He received prison sentences totalling 5 years for acts that in themselves were not imprisonable.³¹ And there is another sentencing-related issue that causes some concern.

At one time, it was feared that an ASBO, supported by the threat of five years' imprisonment, might be used to increase the sentencing power of the court in the event of breach. The Court of Appeal has set its face against such a practice.³² In 2005, it said, sensibly,

"[I]f the offender is not going to be deterred from committing the offence [again] by a sentence of imprisonment for that offence, the ASBO is not likely (it may be thought) further to deter and is therefore not necessary."³³

In fact, where a subject breaches his/her ASBO by committing a criminal offence, the sentence for the breach will usually be no more than that for the offence *per se*.³⁴ Of course, this makes it impossible for the ASBO to fulfil its original purpose: if, in breach, the sentence a court can impose may be commensurate only with the act of breach, nothing can now be done about the *aggregate impact* of the sequence of offences of which breach was merely the culmination.

Furthermore, the Court of Appeal has said that where a breach does not involve further harassment, alarm or distress, a community penalty should be considered, "in order to help the offender learn to live with the terms of the ASBO". If a community penalty is not considered sufficient, a short custodial sentence might be used.³⁵

5. Some social concerns

5.1. Bizarre stories

There are many ASBO stories. They include:

- (a) the Manchester prostitute banned from carrying condoms in the area around the drugs clinic that provided her with free condoms;
- (b) the 13-year-old boy banned from using the word 'grass' anywhere in England and Wales;
- (c) the Scottish woman banned from answering the door in her underwear;
- (d) the 87-year-old man banned from being sarcastic to his neighbours.³⁶

Proponents of ASBOs say these and similar stories are exceptions.³⁷ Nevertheless, a recent study found more than 100 such exceptions by July 2005. Furthermore, as Stuart Macdonald notes:

"[T]he fact remains that the effect of the definition of anti-social behaviour in section 1(1)(a) [of the Crime and Disorder Act 1998] is to confer on enforcement agencies the power to apply for, and obtain, ASBOs in these sorts of situations."³⁸

5.2. Mission creep

The reason cases like these can come about is that ASBOs are now being used far beyond their original purpose. As has been seen, the Labour Party intended them to target persistent, low-level *crimes*, the penalties for which did not correspond to the aggregate impact of those crimes on their victims and on society generally.³⁹ Subsequently, however, there has been a good deal of 'mission creep'.

Even before the 1998 Act came into force, the Government had extended the range of behaviour it would be expected to address. Guidance issued in 1999 said,

"It is intended that the [ASBO] will be targeted at criminal, or sub-criminal, behaviour, not *minor disputes between neighbours or matters which can be dealt with under existing legislation*."⁴⁰

There are two points that might be made about this guidance:

- (a) *ex hypothesi*, sub-criminal behaviour is not *criminal* behaviour; and
- (b) in the years since the guidance was published, *minor disputes between neighbours and matters which can be dealt with under existing legislation* have become very much the core business of the ASBO. This is reflected in the latest version of the Government's guidance, which now concedes that, "The most common behaviour tackled by ASBOs is general loutish and unruly conduct".⁴¹

Burney has said that the term ‘anti-social behaviour’ has come, “to describe a diverse mix of environmental and human incivilities that affect neighbourhoods in a more impersonal and generalised way”.⁴² This discloses another concern about the use of the ASBO.

5.3. Vagueness

The Crime and Disorder Act itself contains no definition of the term ‘anti-social behaviour’. As has been shown, it says, simply, that an ASBO may be granted for behaviour “that causes or was likely to cause harassment, alarm or distress”. This is extremely vague and also, it seems, entirely subjective.

The Home Office Minister, Hazel Blears, is reported to have said of the term, “It means whatever the victim says it means”. That is, perhaps, a chilling notion. Shami Chakrabarti, the director of the civil liberties group *Liberty*, put it like this:

“The guest who arrives late, hogs the conversation, lights a cigarette without permission in the close proximity of diners or children, proceeds to become drunk and obnoxious, makes an unwelcome pass at his hostess and takes a swing at his host has undoubtedly engaged in a range of bad behaviour according to cultural norms (depending on the context and times) and certainly within the statutory definition. But exactly how much of his behaviour should be regulated by the law, let alone mediated by police, local authority and court intervention?”⁴³

And then there are the mothers in Rotherham, who, in the summer of 2006, were filmed passing fish and chips through the school railings to their children.⁴⁴ They did so because of concerns about school dinners, but they might well have caused alarm – if not actual distress – to dieticians or celebrity chefs. Did that bring them within the Crime and Disorder Act? Should those mothers have been given ASBOs, at least until their kids went back to five portions of fruit and veg a day?

The Government says that the vagueness of ASBO law is in fact one of its strengths: that it permits a flexibility that, for example, allows responses to be worked out locally, taking account of local priorities.⁴⁵ But there might be a danger in all this flexibility; in making local law for local people. It seems those people take a very broad view of what ‘anti-social behaviour’ means – a much broader view, in fact, than the one taken by the Government.

The 2003/2004 British Crime Survey asked respondents to choose ‘very big’ or ‘fairly big’ problems in their local area from a list of 16 problems, which included: “drug use or dealing”; “racial attacks”; and “people being insulted, pestered or intimidated”. The run-away biggest problem identified was “speeding traffic”, which was chosen by 43% of respondents. Next were “cars parked illegally or inconveniently” (32%), “rubbish and litter” (29%) and “fireworks (not part of an organised display)”

(29%). More typical ASBO incidents came at the bottom of the list, with “disputes between neighbours” identified as a problem by only 6% of respondents.⁴⁶

Writing specifically about ASBOs, the Commissioner for Human Rights in Europe has warned:

“What is striking [...] about [ASBOs] is the fact that [they] are intended to protect not just specific individuals, but entire communities. This inevitably results in a very broad and occasionally excessive range of behaviour falling within their scope as the determination of what constitutes anti-social behaviour becomes conditional on the subjective views of any given collective. [...] At first sight, indeed, such orders look rather like personalised penal codes, where non-criminal behaviour becomes criminal for individuals who have incurred the wrath of the community.”

“I [...] question the appropriateness of empowering local residents to take such matters into their own hands.”⁴⁷

As long ago as 1998, Ashworth *et al* said that the then new ASBO powers were “unpleasantly reminiscent of powers granted in former East Germany to housing block committees – which also had unrestricted powers to regulate residents’ lives”. They warned:

“[There] is no obstacle to [ASBOs] being used as weapons against [...] unpopular types, such as ex-offenders, ‘loners’, ‘weirdos’, prostitutes, travellers, addicts, those subject to rumour and gossip, those regarded by the police or neighbours as having ‘got away’ with crime, etc.”⁴⁸

This warning might now be seen as uncannily prescient.

5.4. Children

It is possible to make an ASBO against a child, provided s/he is at least ten years old.⁴⁹ Originally, it was intended that ASBOs should not be used routinely against people under 18.⁵⁰ That position changed when the first substantive ASBO guidance was published,⁵¹ and now, ASBOs are commonly made against children.

In the six-and-a-half years to September 2005, a total of 2,995 ASBOs were made against children in England and Wales. Most, again, were made in Greater Manchester, which accounted for nearly a fifth of the total (550 ASBOs), and the fewest ASBOs were made against children in Wiltshire (11 ASBOs).⁵²

The use of ASBOs on children is, of course, highly controversial. The Commissioner for Human Rights in Europe has suggested that when they breach an ASBO, some 46% of children are sent to prison. He said:

“[T]he detention of children should be a last resort – detaining children for activity that is not itself criminal can scarcely be consistent with this principle.”⁵³

Part of the essential apparatus of the ASBO is the ‘naming and shaming’ of offenders. Photographs and personal details are posted on the internet, and there are often door-to-door leaflet drops and poster campaigns to alert local residents to the fact that they have in their midst someone who, for example, carries condoms, speaks sarcastically to his neighbours or says the word ‘grass’ when forbidden to do so. And the law makes precious little exception for children.

This state-of-affairs has been criticised by a large number of people, including the Government-appointed chair of the Youth Justice Board, Professor Rod Morgan,⁵⁴ and also by the Children’s Commissioner in England, Al Aynsley-Green.⁵⁵ It is also the thing for which the Commissioner for Human Rights in Europe reserved perhaps his strongest criticism. He said:

“It seems to me [...] to be entirely disproportionate to aggressively inform members of the community who have no knowledge of the offending behaviour, and who are not affected by it, of the application of ASBOs. [...] [T]hey have no business and no need to know. [...] The aggressive publication of ASBOs, through, for instance, the doorstep distribution of leaflets containing photos and addresses of children subject to ASBOs risks transforming the pesky into pariahs.”⁵⁶

The Commissioner suggested that the ‘naming and shaming’ of ASBO-recipients would breach their right to respect for private and family life under Article 8 of the ECHR. Where it involves children, it almost certainly breaches Article 40(2) of the United Nations Convention on the Rights of the Child.⁵⁷

5.5. The mentally ill

Nowhere is the ASBO more controversial than when it is used on people who are, or are suspected to be, suffering from a mental disorder.

The woman mentioned at the beginning of this paper, who was banned by the magistrates from going near railway lines, rivers, bridges and multi-storey car parks, appealed against her ASBO, but at Bristol Crown Court, a judge upheld it. He said it was necessary to protect the woman’s potential rescuers.⁵⁸

It would be helpful to be able to say just how frequent an occurrence this is, but figures are hard to come by.

On 14 July 2005, in answer to a Parliamentary Question, Hazel Blears said, “We have not received any evidence to suggest that ASBOs may disproportionately affect individuals with a disability.”⁵⁹

Of course, any ‘disproportionate effect’ is only part of the problem: many would argue that disabled people – particularly those whose disability it is that provokes their ‘anti-social’ behaviour – shouldn’t be subject to an ASBO at all. But, the authority of the minister’s answer was further undermined by what she had said the day before.

When asked to give the number of ASBOs issued to children with Tourette’s Syndrome, Asperger’s Syndrome or a disorder on the autistic spectrum, Ms Blears said, “Information is not collected centrally about the characteristics of persons issued with an Anti-Social Behaviour Order”.⁶⁰

So, as far as ASBOs and the disabled are concerned, the Government doesn’t have any evidence of disproportionate effect, and it doesn’t have any such evidence because it doesn’t have any evidence at all.

Mind has called upon the Government to examine the current use of ASBOs and alternative ways of addressing anti-social behaviour. It asks, “How can it be right that the response to an individual’s mental distress is to put them under threat of imprisonment?”⁶¹

But the ASBO is at its most controversial where it’s used on *children* with mental disorder. Particular cases include:

- (a) the 15-year-old boy, whom the court knew to be suffering from Asperger’s Syndrome, who was ordered not to look into his neighbours’ gardens; and
- (b) the other boy, also 15, with Tourette’s Syndrome, who was ordered not to swear in public.⁶²

In a recent study, the British Institute for Brain Injured Children found that up to 35% of children with ASBOs had a diagnosed mental disorder or an accepted learning disability.⁶³

6. The ASBO and social policy

6.1. Prostitution

When the Government published its initial guidance, prostitution was not mentioned as something against which an ASBO might be granted. By 2002, however, Home Office research had shown that 5% of ASBOs were imposed for prostitution.⁶⁴ Later that year, the Government added prostitution to its ASBO list.⁶⁵

In 2003, the High Court held that where the behaviour of an individual prostitute could not be shown to have caused harassment, alarm or distress, she could still be placed under an ASBO if her behaviour contributed to the ‘character’ of the neighbourhood and it did have that effect.⁶⁶

So, if the way s/he conducts him/herself has a detrimental effect upon the ‘character’ of the area in which s/he works, a prostitute may be placed under an ASBO, and possibly sent to prison. And yet, in 1982, Parliament abolished the use of imprisonment for street prostitution.⁶⁷ Jones and Sagar have warned:

“We may find the Crime and Disorder Act returns the street prostitute to an era of crime control castigated in Parliament as iniquitous and causing unacceptable hardship.”⁶⁸

This state-of-affairs, which has been brought about in the last two or three years, and solely as a result of the ASBO, has had the effect of undermining more than two decades of progressive change.

6.2. Amending the mental health act

For a long time, the Government intended to replace the Mental Health Act 1983 ('MHA 1983') with a new Act.⁶⁹ A key component of any new Act would have been compulsory treatment in the community.⁷⁰ This would have marked a radical departure from the provisions, and also the spirit, of the 1983 Act, which, with some modest exceptions, does not apply to patients after they have left hospital.

Under the Government's proposals, a patient could be discharged from immediate detention but remain subject to strict conditions, the breaching of which would see him/her hauled back into detention.

In fact, though the Government has abandoned its plans to replace MHA 1983 with a new Act and will instead concentrate on amending the old Act,⁷¹ this scheme – newly rechristened 'Supervised Community Treatment' ('SCT') – is one of the amendments it *does* propose to make.⁷²

It seems that a patient subject to SCT might have various conditions imposed upon him/her, and that those conditions won't need to be directly related to his/her mental disorder. They might, for example, go beyond merely requiring the patient to attend for a fortnightly injection and extend to restrictions thought necessary, not to help the patient, but simply to safeguard the community.

This idea was widely criticised at the time of the Draft Bill, to the extent that in 2005, a Joint Parliamentary Committee said:

"[We fear] that the powers granted in the current bill could potentially be used as the equivalent of a mental health ASBO – enforcing treatment on those who might be a 'nuisance' but who don't pose any significant risk to the public."⁷³

It seems that the ASBO is beginning to cast a very long shadow.

7. Conclusion

The Anti-Social Behaviour Order is now a fixture, not just of the legal system in England and Wales, but also of the culture and in the public consciousness. Its use has grown exponentially, up more than 7000% in six years (albeit from a standing start). There continue, however, to be very real fears.

- (a) There are huge regional differences in the use of ASBOs, and one reason for those differences may be the zealotry of local officials – something that for some commentators, at least, is redolent of the Eastern Bloc.

- (b) Although the Court of Appeal has reined in magistrates' courts in recent months, ASBOs are still used against the most vulnerable in society, including children, the mentally ill and, perhaps least forgivably, appreciable numbers of children who are mentally ill.
- (c) No one really knows what the limits of the ASBO are. It is commonly used way beyond its original purpose and in a bewildering variety of situations, for behaviour that is often very far from criminal in nature.
- (d) Around 45% of ASBOs are breached, and in breach, more than 50% of people are sent to prison. That's more than 1500 people sent to prison since 1999, many of them for something that was not imprisonable, or that was not even a criminal offence.
- (e) This state-of-affairs has attracted criticism from legal and diplomatic quarters, and even from officials appointed by the Government itself; and it seems likely to bring the United Kingdom into breach of many of its most important obligations under international law.
- (f) And finally, the ASBO is beginning to exert its baleful effect over other, adjacent areas of social policy.

How, then, should all this make us feel?

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